(12)



No. 92-1450

IN THE

# Supreme Court of the United States

CYNTHIA WATERS, Et Al.,

*Petitioners,*

V.

CHERYL R. CHURCHILL, Et Al.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NEW YORK CITY HOUSING PATROLMAN'S BENEVOLENT ASSOCIATION, INC., AS AMICI CURIAE

J. Michael McGuinness*
McGuinness & Parlagreco
Post Office Box 8035
11 Church Street, Suite 306
Salem, MA 01970
508-741-8051
* *Counsel of Record*
*For Amici*

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789



34 pp

## QUESTIONS PRESENTED

1. Whether summary judgment may be granted to a public employer who fires an employee based on unsubstantiated reports and rumors that the employee engaged in speech, where the speech by the employee addressed the employee's concerns over problems and risks in a substandard nurse staffing policy at a public hospital?

   A) Whether speech addressing public health risks associated with a substandard nurse staffing policy at a public hospital relates to a matter of public concern?

   B) Whether the Seventh Circuit below erred as a matter of law when it balanced the competing interests of Nurse Churchill and her employer and found that "Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional ... clearly outweighs the hospital's interests in interfering and ultimately preventing her from speaking out on important matters of public concern?"

2. Whether it was sufficiently established in 1987 that a public employer could not fire an employee for communicating about a substandard nurse staffing policy or whether an individual public employer may be qualifiedly immune from damages in such a case?

## TABLE OF CONTENTS

TABLE OF AUTHORITIES

**OTHER AUTHORITIES**

IN THE

# Supreme Court of the United States

October Term 1992

---

No. 92-1450

CYNTHIA WATERS, Et. Al., Petitioners

v.

CHERYL R. CHURCHILL, Et. Al., Respondents

---

On Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

---

## BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NEW YORK CITY HOUSING PATROLMAN'S BENEVOLENT ASSOCIATION, INC. AS *AMICI CURIAE*

---

## INTEREST OF THE *AMICI CURIAE*

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states. The New York City Housing Patrolman's Benevolent Association, Inc. (hereafter NYHPBA) was formed in 1954 and has over three thousand active and retired members.

Both *Amici* and their members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers and nurses, like Cheryl Churchill, frequently suffer reprisal for whistleblowing and communicating about issues within their agencies. Both *Amici*,

their members and millions of public employees in over 182,000 governmental units[1] would be severely jeopardized and their speech chilled if the Seventh Circuit judgment and opinion below were to be reversed.[2]

*Amici* vehemently submit that the continued right to free speech by public employees, as historically recognized by this Court, is perhaps the most important component of maintaining safety and efficiency in the public sector workplaces of America. *Amici* accordingly submits this brief to assist this Court in its resolution of this important case.[3]

## STATEMENT OF THE CASE

*Amici* adopt the Statement of the Case and Facts as presented by Respondent. The presentation of facts in Respondents' brief represents a stark alternative to the one-sided factual allegations in Petitioners' brief. These distinctions are perhaps dispositive of this case.

*Amici* will highlight a few facts relevant to their arguments, *infra*. After Churchill and Dr. Koch voiced serious concerns about the cross-training policy, both came under intense scrutiny.[4] The employer began purportedly documenting allegations against them in "files."[5] Beginning on August 21, 1986, the retaliation intensified into a full blown campaign to punish both Churchill and Koch, which was prompted by their voicing concerns over the cross-training program.

On January 16, 1987, Churchill engaged in a speech with a cross trainee, Melanie Perkins-Graham. Churchill spoke with Ms. Graham as they had their dinners around 5:00 p.m. Nurse Mary Lou Ballew only overhead limited "bits and pieces" of the conversation between Churchill and Graham, and Ballew was not paying much attention. Ballew began overhearing the conversation in the middle of it, and it did not make any sense to her. This conversation, and the circumstances thereof, are specified in detail in Respondents' brief. This conversation started the runaway truck that caused the termination of Churchill.

Upon hearing that Churchill had spoken, Waters advised her superior that it was time to fire Churchill. See R.76A, T. 5, p. 310. When Waters and her superior, Ms. Davis, followed up on Churchill's speech with the recipient of the speech, Waters and Davis told the recipient of the speech, Ms. Graham, that they wanted confirmation of whether Churchill had criticized the hospital. See R.76A, T. 5, pp. 311-314; R.76E, T. 43.

Waters stated that she would not have fired Churchill had it not been for the speech which was reported to her. See R.76B, T. 8, p. 436.; R. 76A, T. 4, pp. 301. Waters also admitted that Churchill's speech as reported could have referred to criticism of the cross-training policy. See R76B, T. 8, pp. 444, 447 - 448. In light of all of the facts and circumstances, it is logical and reasonable to conclude that Waters knew enough of the subject matter of Churchill's speech.

Jean Welty, the shift supervisor who heard Churchill's speech, testified that Churchill's speech disrupted nothing. See R.76E, T. 24, pp. 52 -53. Waters and Davis were not concerned because they did not ask Graham whether her enthusiasm had been dampened by the

---

[1] See McGuinness, Constitutional Employment Litigation, 43 Am. Jur. TRIALS 1 (1991)("The laws governing public employment relations profoundly affect the daily lives of millions of public employees as well as the efficiency and quality of government services.") Approximately fourteen million persons are employed by state and local government throughout the country. U.S. Department of Commerce, Statistical Abstract of the United States 1989, No. 479 at 293. Excluding the military, more than three million persons are employed by the federal government. *Id.* No. 512 at 318.

[2] *Amici's* members are frequently confronted with reprisal by police management for commenting upon law enforcement policies. The sheer volume of reported cases addressing free speech issues by public employees demonstrates the substantial magnitude of retaliation from speech.
In many American jurisdictions, public sector collective bargaining is not authorized and the employment at-will doctrine is still well entrenched. Due process rights frequently depend upon property interests, and public employers have responded to that by explicitly negating such interests. Thus, for many public employees, the First Amendment is among a very few limited sources of protection from governmental retaliation.

[3] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of Court.

[4] Petitioner Waters admitted that Churchill had never been obstructionist in her opposition to the cross-training program.

[5] According to Jean Welty, a former supervisor in obstetrics, "sometimes [Waters] did[write down different things]" from what she would say in the evaluation sessions. See R.76E, T.24, P. 199. Thus, Waters' production of "notes", and the accuracy thereof, to purportedly document allegations is inherently suspect.

conversation with Churchill and Graham did not say that it had been. See R.76A, T. 5, pp. 296, 304. Most nurses in the OB department never heard of Churchill's conversation and none heard of any adverse affect that Churchill's speech may have had. Agency disruption was therefore not involved.

## SUMMARY OF ARGUMENT

The speech and expressive conduct of Respondent Cheryl Churchill must be protected by the First Amendment to the United States Constitution because her speech touched upon a matter of critical local and national concern: a nurse staffing policy in violation of health standards to purportedly address a nursing shortage in a public hospital where the public health is in issue.

In his authoritative treatise, Senator Sam J. Ervin, Jr. explained how our "First Amendment freedoms are often grossly abused." Ervin, Preserving The Constitution (1984). Senator Ervin observed that "free speech is in mortal danger in America." *Id.* at x. Cheryl Churchill's firing for speaking about health issues demonstrates the wisdom in Senator Ervin's analysis.

As an "insider" public employee and knowledgeable nurse at the McDonough District Hospital, Churchill appropriately communicated her ideas about the nurse staffing policy known as cross-training. The staffing policies of public hospitals are, for obvious reasons, matters of vital public concern because public health and welfare are directly in issue. Such speech has been historically protected.

The radical position being advocated by Petitioners herein would have dedicated public employees turn a deaf ear to hazards within their agencies in order to save their jobs. Petitioners have seized upon an employment term of art, "insubordination[6]," to purportedly justify firing a dedicated public servant. "Insubordination" has perhaps become the most common subterfuge when attempting to cover up protected con-

[6] After concluding that "insubordination" would justify the termination, the employer's agent performing the so called "investigation" against Churchill, testified that she did not even talk to Churchill before coming to the "insubordination" conclusion. See Petitioner's Brief at 12. Such biased investigations without affording the accused a chance to have any input at all is suggestive of partiality, prejudgment and palpable arbitrariness.



duct or discrimination.[7] The alleged "insubordination' defense is frequently used as the last defense of the defenseless in employment litigation.

In this case, turning a deaf ear on the nurse staffing problem could lead to death of patients, a prospect that no reasonable public employer should desire to risk.[8] Remaining silent in this context would have offended ethical and professional obligations of nurses everywhere. Consequently, the First Amendment not only protected Churchill's right to communicate, but sound public policy also encouraged her communication.[9] To allow public employers with malicious retaliatory motives to fire nurses who communicate will chill the free speech rights of nurses and public employees throughout the nation. Cheryl Churchill is to be commended - rather then fired - for communicating so as to protect the health of her patients.

As the Seventh Circuit found, fact questions predominate this case. A jury must decide what Churchill said before the ultimate application of law can be made. *Jones v. Dodson*, 727 F.2d 1324 (4th Cir. 1984).[10] At this juncture, Churchill's version of facts must be accepted. As the Seventh Circuit found, in "taking action to report this controversial practice, Churchill lived up to the highest ethics of her most noble profession." 977 F.2d at 1125. Churchill's speech was well within the parameters of free speech by public employees as enunciated by this Court in *Rankin v. McPherson*, 483 U.S. 378, 387 (1987): [D]ebate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp

[7] Amici regularly have to deal with bogus charges of "insubordination" in defending their members. See, e.g., *Howell v. Town of Carolina Beach* 417 S.E.2d 277 (N.C. 1991), where the public employee was fired for "insubordinate speech" in a memorandum addressing defective police firearms. The court rejected the attempted misuse of the insubordination defense. The speech was held protected.

[8] Petitioners concede in their brief that "[t]he department had had staffing problems." Petitioner's Brief at 9. This concession legitimizes Churchill's speech and underscores the public concern issue.

[9] See e.g., *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3rd Cir. 1983)(public policy wrongful discharge claim grounded in constitutional free expression right).

[10] This is precisely what the Seventh Circuit below observed. Since the characterization of the speech is substantially in dispute, the trier of fact must make the credibility judgments. 977 F.2d at 1124.

attacks on government and public officials."

## I. INTRODUCTION

As this Court explained in *Rankin v. McPherson*, 483 U.S. 378, 384 (1987):

> Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse.

Such discourse about dangerous nurse staffing policies is inherently healthy. The nature of Churchill's speech is accurately set out in the Seventh Circuit opinion below. Petitioner Waters was displeased with Churchill's "opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward..." 977 F.2d at 116. The dangers apparent to Churchill and others from the new nurse staffing plan are accurately set out by the Seventh Circuit. See 977 F.2d at 1116 - 1120. The Seventh Circuit demonstrated how the risks of which Churchill complained contravene fundamental standards of healthcare organizations. 977 F.2d at 1122 - 23.

### A. The Record Must be Construed In Churchill's Favor On Summary Judgment

Despite pervasive attempts by Petitioners to submit their one-sided view of the facts as a basis for this Court's analysis, it is imperative that this Court follow its settled practice of construing the facts in the light most favorable to the party opposing summary judgment, the Respondent herein. A careful reading of the record and opinion below demonstrates that Petitioners efforts to characterize the speech in question rises to the level of mischaracterization.[11]

---

[11] Examples of misleading characterizations of facts, construed heavily in Petitioner's favor appear throughout their brief. The Seventh Circuit opinion presents a more objective factual presentation, consistent with this Court's teachings about basic summary judgment principles. The Seventh Circuit in fact found that Petitioners had "misrepresent[ed] the record" below. 977 F.2d at 1127 n. 10.



Nowhere is Petitioners' selective portrayal of alleged facts any more misleading than their allegations of Churchill's work record and history. To the contrary, Churchill's work history was officially documented and the objective evaluations demonstrated a conscientious and dutiful employee. Churchill's year end evaluation of January 5, 1987 indicated "standard performance" on all categories including "positive attitude" and "accepting what could not be changed" and "constructively working to change what could and should be changed." Petitioner's loaded allegations, overwhelmingly construed in Petitioner's favor, totally fails to acknowledge the obvious pattern of retaliation against Churchill and Dr. Koch. Despite Petitioners' quarrel with Churchill, they did nothing to punish her until she engaged in her speech of January 16, 1987. It was Churchill's speech that caused the ultimate act of brutal retaliation.

*Amici* implore this Court to carefully review the extensive presentation of facts in Churchill's brief. Churchill therein demonstrates, with exacting precision, the facts developed which are simply not the alleged facts being suggested by Petitioners. Accepting at face value the purported facts as suggested by Petitioners would violate this court's summary judgment standards. The contemporary summary judgment standard in employment termination cases is extreme: summary judgment should not be granted unless it is perfectly clear that there is no genuine issue of material fact. E.g., *McKinney v. Bd. of Trustees*, 955 F.2d 924, 928 (4th Cir. 1992).

## II. STANDARD OF REVIEW

Since the issue before the Court involves First Amendment free speech rights, this Court has enunciated the most rigorous methodological framework for determining the issue. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976)(public employee discharge examined under First Amendment). Such a First Amendment "encroachment 'cannot be justified upon a mere showing of a legitimate state interest.'...The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." Id.; *Rutan v. Republican Party*, 497 U.S. ____, 111 L Ed.2d 52, 68 (1990)(government must have a "vital interest" in limiting First Amendment freedoms of public employees.); *Eu v. San Francisco*, 109 S.Ct. 1013, 1021 (1989)(compelling governmental interest needed to

burden free speech or association).[12]

For generations, this Court has vigilantly protected the free speech and associational rights of public employees like Churchill. E.g., *Rankin v. McPherson*, 483 U.S. 378 (1987)(affording free speech protection to employee who remarked about assassination attempt on President Reagan; Court found speech was of public concern and therefore protected); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and their many antecedents. There is no reason to reverse or retreat from this proud heritage.

## III. THE VALUE OF THE FIRST AMENDMENT FREE SPEECH INTEREST IN THE PUBLIC EMPLOYMENT CONTEXT

Why is it so essential that public employees be allowed to freely speak without suffering reprisal by the government? *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir. 1989)(public employee speaking about manpower shortage protected) provides a thorough and compelling explanation of the "Values Which the First Amendment Embodies" in the specific context of public employment:

> Traditional, 'Free speech is protected because it has values; it springs from the age of enlightenment out of which the spirit of the American Revolution came...' Citizens in a democracy need to hear about problems that their government encounters. To assist people in making informed decisions, information must be made public for citizen deliberation. 877 F.2d at 379.[13]

[12] Courts have been especially clear that summary judgment should not be granted in employment cases absent the most extreme circumstances. The circuit courts have "emphasized repeatedly the drastic nature of the summary judgment remedy and has held that it should not be granted unless it is **perfectly clear** there are no genuine issues of material fact in the case." *Ballinger v. N.C. Agric. Ext. Serv.*, 815 F.2d 1001, 1004-05 (4th Cir. 1987); *McKinney v. Bd. of Trustees*, 955 F.2d 924, 928 (4th Cir. 1992)(applying perfectly clear standard in constitutional employment discharge case). Cases involving questions of motive are especially inappropriate for summary judgment. E.g., *Stumph v. Thomas Skinner*, 770 F.2d 93 (7th Cir. 1985)

[13] In the public hospital context, issues of policy must be constantly debated, internally and externally, so that health care institutions can remain abreast with the latest procedures to enhance efficiency and ultimately better health for all. In the public hospital context, chilled silence can be deadly.



"Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). At the core of the First Amendment is the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). A paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214 (1966). Speech about the policies and practices of a public hospital whose decisions affect the daily lives of citizens in communities throughout America is logically consistent with this Court's historic precedents guaranteeing speech rights.

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *NAACP v. Claiborne*, 458 U.S. 886, 913 (1982). Chief Judge Sam Ervin's opinion in the leading First Amendment public employee case of *Piver v. Pender Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987) could not be clearer:

> The value of freedom of speech, the Constitution's 'most majestic guarantee' is so high that it cannot be adequately described in purely instrumental terms. 835 F.2d at 81.

What would happen in our more than 182,000 governmental agencies if public employees were chilled into silence as Petitioner's position contemplates? What would happen if public employees turned a deaf ear rather than communicating about job-related problems? Public agencies must become aware of inept policies and practices; the senior policymakers with public agencies and the public become aware of such polices and practices by insider employees, like Cheryl Churchill, who communicate, sometimes complain and blow the whistle on such inept practices. Communicating and reporting governmental inefficiency is a time honored American tradition. Petitioners admit that "Churchill's experience was consistent with that of other nurses, most or all of whom voiced concerns about the cross-training program..." Petitioner's Brief at 7 - 8.[14]

[14] Petitioner's efforts to dramatize their self-serving characterization of Churchill's speech as "insubordinate speech" are endless as this mischaracterization appears throughout their brief and in their statement of issues. However, in reality, Churchill's speech was not insubordinate to anyone. Even if it was insubordinate speech, whatever that means, the speech must still be protected.

## IV. CHURCHILL'S SPEECH ADDRESSED A MATTER OF VITAL PUBLIC CONCERN AND IS THEREFORE PROTECTED

A threshold question in most public employee discharge cases premised upon the exercise of one's right to free speech is whether the speech related to a matter of public concern. E.g., *Rankin v. McPherson*, 483 U.S. 378, 384-85 (1987); *Piver v. Pender Bd. of Educ.*, 835 F.2d 1076, 1078 (4th Cir. 1987). Petitioners essentially concede that nurse staffing issues are of public concern. See Petition for Writ of Certiorari at 11 -12 at note 11.[15]

Speech relating to public concern has been defined as any speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146 (1983). "Issues which touch upon public concern are limitless." *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989). Nurse staffing policies at public hospitals are unquestionably within the concern of the community.

Petitioner's contention that Churchill's speech did not address issues of public concern does not cite a single circuit or other case supporting its contention. See Petitioner's Brief at 33 - 36. That is because no case has ever held that the public health is not a matter of public concern for purposes of a free speech claim by a public employee.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Rankin*, 483 U.S. at 384-85. Chief Judge Sam Ervin's authoritative opinion in *Piver* explains the public concern framework:

> The "public concern" or "community interest" inquiry is better designed - and more concerned - to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that it is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee - most typically, a private personnel grievance. The focus is therefore upon whether the "public" or community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

Here, the speech in issue is not some private matter. Public hospital policy and patient care are among the most common and important public concerns. Circuit courts have consistently held that working conditions of public employees constitutes a matter of public concern. Thus, even if this Court deems that Churchill's speech related to her own working conditions, her speech would still be protected.[16]

### A. Employment Policies At Public Workplaces Inherently Involve Public Concern

A plethora of other cases consistently hold that speech or criticism by public employees about departmental employment practices is of utmost public concern and constitutionally protected. E.g., *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990)(publicly employee criticized his own employer's promotion practices; such speech held constitutionally protected); *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir. 1990)(public employee's speech about his own department's personnel

---

[15] However, the public concern issue must be analyzed to determine the extent or degree of public concern because that is especially relevant under this Court's framework in *Connick v. Meyers*, 461 U.S. 138 (1983).

[16] See *Hickory Firefighters v. City of Hickory*, 656 F.2d 917, 1920 (4th Cir. 1981). Even if the Court deems that Churchill had some personal interest, as a result of her employment with the Hospital, that does not affect the protected nature of the speech. Where there exists an overlap, a person can have a personal interest in an issue, yet it remains nonetheless a matter of public concern. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-1202 (3rd Cir. 1988); *Kinsely v. Salado Ind. School Dist.*, 916 F.2d 273, 278-79 (5th Cir. 1989); *Zamboni v. Stagler*, 847 F.2d 73, 77 (3rd Cir. 1988); *Matulin v. Lodi*, 862 F.2d 609,612-13 (6th Cir. 1988); *Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir. 1990); *Hall v. Ford*, 856 F.2d 856 F.2d 255, 260 (D.C. Cir. 1988); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983).

practices held protected); *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989)(firefighter's speech concerning manner in which police and firefighters performed their duties was of public concern and protected); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980)(firefighter's remarks critical of fire chief and fire department held protected); and other cases *infra*. Public employees must not be muzzled for political or personal purposes at the expense of the core values of the First Amendment.[17]

### B. The Content of Churchill's Speech Compels Protection

Of the three factors to analyze (content, form and context of speech), the Circuit courts have held that the "**content, subject matter**, of the speech in issue is always the central aspect" in making the public concern determination. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988). A plethora of courts have held that speech relating to the conduct and performance of public agencies is of utmost public concern and is among the most protected forms of any kind of speech. [18] Conditions within public hospitals are of such great public

---

[17] Churchill's remarks did not arise out of a personal or personnel dispute, or grievance with her employer. Rather, her remarks represented a broad concern over the medical and ethical propriety of the nurse staffing policy.

[18] E.g., *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301-02 (7th Cir. 1990)(public employee's interview with press discussing lack of agency funding protected); *Manhatten Beach Police Ass'n v. City of Manhatten Beach*, 881 F.2d 816 (9th Cir. 1989)(public employee's letter to local newspaper critical of manpower shortage held protected); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988)(public employee's interview with reporter alleging racial harassment of her held protected); *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988)(public employee's statements to press regarding employment discrimination held protected); *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989)(police chief's statements to press held protected); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988)(letter alleging public agency's improprieties held protected); *Murphy v. City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986)(public obviously concerned with how a police department is operated); *Bricknell v. Norton*, 732 F.2d 664 (8th Cir. 1984)(Public has a "vital interest" in police department); *Soleman v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1988)(public employee's statements alleging departmental improprieties held of public concern and protected); *O'Brien v. Town of Caldonia*, 748 F.2d 403, 407 (7th Cir. 1984)( public employee's communications alleging departmental problems "is deserving of vigilant protection by the First Amendment.")



concern because those conditions constantly affect the level of public health and safety.

Speech relating to conditions within public agencies has consistently been held to be constitutionally protected. E.g., *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1991). If such conditions and problems are not discussed by public employees and others, such problems are not likely to be resolved for the benefit of the public. In *Rankin*, this Court held that an expressed desire to kill President Reagan was of public concern and constitutionally protected. If such offensive speech with overtones of criminal behavior is protected, it hardly can be gainsaid that Churchill's non-offensive speech relating to vital public health issues is likewise entitled to protection.

Speech by public employees about **morale problems** within their own employing agencies is also consistently held to be constitutionally protected. E.g., *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988); *Brukiewa v. Police Commissioner*, 263 A.2d 210 (Md. 1970)(in a seminal case, police officer's public criticism on public television that morale had "hit its lowest ebb" held protected); see numerous cases cited *supra*.

Even direct and harsh criticism of public agency management by employees has been historically protected. E.g., *Clemons v. Dougherty County*, 684 F.2d 1365 (5th Cir. 1982); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986)(public employee's criticism of mayor while at workplace held protected); *Clary v. Irvin*, 501 F. Supp. 706 (E.D. Tex. 1980)(police officer's complaints about police chief's performance, equipment shortages and personnel policies held to be protected speech). In *Clary*, the court explained that "as providers of public services, the officers had the prerogative, even the duty, to comment on the quality of that service when trying to improve it." Cheryl Churchill was acting within the spirit of this tradition when trying to improve nursing and medical conditions within her employing agency. Even if Churchill's speech criticized Waters, it must be protected. Employment within the public sector, especially in public hospitals, requires supervisors such as Waters to handle such foreseeable rigors as criticism by staff as part of her duties and function.

*Clemons* is especially persuasive. There, the plaintiff, a police sergeant, strongly criticized his own chief of police. The court characterized the plaintiff's speech as "highly critical" and then held that the remarks about the chief and the department must be protected. Even

a public employee who described his boss as a "son of a bitch, a bastard, as sorry as they come and nothing but a back stabbing son of a bitch" was engaging in protected speech. *Waters v. Chafin*, 684 F.2d 833 (11th Cir. 1982). Complimentary speech that does not invoke robust debate typically does not need constitutional protection.

Situations like *Clemons*, this case, and others cited herein involve the type speech that sometimes invokes often brutal retaliation including outright terminations by public employers. It is this type case that makes one appreciate the First Amendment's majestic protections. Without such constitutional protection, public employers could chill any meaningful criticism or debate about conditions in such agencies thus depriving taxpayers from knowing the efficiency of government.

### C. The Context of Churchill's Speech Favors Protection

At the outset, it is imperative to recognize that the **context** of Churchill's speech came at an appropriate time and place. Nor did it come on the heels of a personnel grievance. Churchill's concerns were work-related concerns, which she communicated after the nurse staffing policy began to cause problems.

The fact that Churchill did not communicate publicly does not detract from the protected nature of her speech. This Court has expressly held such private speech to be protected. *Givehan v. Western Line*, 439 U.S. 410, 414-16 (1970); accord *Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Many of our most troubling matters of public concern, such as race discrimination in *Givehan*, frequently initially arise in essentially private discussions.

In virtually all of the leading First Amendment public employee discharge cases, the employee has somehow spoken about his or her employing agency or issues related thereto. See, e.g., *Connick* (employee complained about office transfer policy in her employing agency); *Piver* (Plaintiff school teacher's speech in support of tenure for his principal); *Ware v. Unified School Dist.*, 881 F.2d 906 (10th Cir. 1989)(employee speaking out about school bond issue was of public concern); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1989)(letter relating to police departmental improprieties in plaintiff's own department was of public concern and protected).

The context of Churchill's speech was strikingly similar to the many



cases affording protection. Employee lunch breaks are perhaps the most common time that employees have an opportunity to discuss workplace issues with co-workers.

### D. Form of Speech: Verbal Speech In A Classic Employment Forum

Certain features of Churchill's speech enhance its importance to her and to the public. First, the speech in issue took place on the job where employees frequently discuss and debate agency related issues such as the nursing staff policy.[19] Churchill had actual knowledge of the issues being discussed. As *Piver* explained: "the public has a need to hear from those who know concerning the performance of public officials." 835 F.2d at 81; accord *Moore*, 877 F.2d at 372. Churchill's speech was professional, internal, factually accurate and low key; it was not threatening, vulgar, defamatory, rude or otherwise offensive.

### E. The Public's Right To Know Must Be Protected

Churchill's right to speak about these issues does not simply help focus the inquiry, it also protects the public and its right to know. *Virginia State Bd. v. Virginia Citizens*, 425 U.S. 748, 756-57 (1976)(public's right to receive information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65 (1972)(public's right to hear alien's speech).[20] In *Moore*, the court held that "both Moore and the public have a strong interest in Moore's speech" about public personnel manpower shortages. 877 F.2d at 372. The foregoing analysis makes it clear that this case involves considerations which transcend an employer-employee dispute. It is difficult to conceive a matter of greater public concern than public health.

---

[19] Churchill did not publicly blast the Hospital or the policy, which could have raised issues of disruption not present in this Case.

[20] *Accord Red Lion v. FCC*, 395 U.S. 367, 386 (1969)(public's right to access); *Thomas v. Collins*, 323 U.S. 516 (1945)(right of workers to hear organizer's speech); *Martin v. Struthers*, 319 U.S. 141, 143 (1943)(public's right to receive information).

## V. THE BALANCING TEST: THE INTERESTS OF THE COMMUNITY AND CHURCHILL SUBSTANTIALLY OUTWEIGH ANY POSSIBLE INTEREST OF THE DEFENDANTS

In most cases, courts balance the interests of the government as employer with the interests of the speaking employee. In such cases where the employee directly speaks about his or her employer and causes substantial harm or actual disruption to the employer, then the court must weigh and balance the interests of the parties. If Churchill had publicly criticized her employer, then the court would have to employ the balancing test.[21] Petitioner presents the bald assertion that "since nurses work closely together ... a lack of cooperation or disharmony could have an adverse affect on the efficient delivery of appropriate health care." Petitioner's Brief at 32 (emphasis added). Petitioners' theory of potential disruption is speculative and not grounded on any facts in the record which would reasonably support this strained theory. Debating controversial policies does not cause disharmony; rather, it serves to resolve disharmony by getting the problems out in the open.

The record before this Court does not present facts indicating actual disruption to the employer. Nor was there any objectively identifiable serious potential for substantial future disruption to develop from Churchill's speech. The Seventh Circuit correctly found that the District Court's decision finding that Churchill's speech was "inherently disruptive" was "erroneous because it is based on inferences from the record that are adverse to Churchill." 977 F.2d at 1123.

While this Court's opinion in *Connick* recognized in dicta that an employer need not always have to wait until substantial actual disruption materializes before taking action against an employee, the circuit cases following and interpreting *Connick* have held that future potential

---

[21] However, even if Churchill had directly and publicly criticized her employer, given the extreme public importance of the underlying issue - the effectiveness of a nursing staffing policy which affects the public health and safety - the interests should be balanced in the favor of Churchill and the public.
Numerous cases have recognized that public employees are free to communicate about and even directly and publicly criticize their own employers. E.g., *Brawner*, 855 F.2d 192 (police officer criticized his own agency; speech found protected); *Manhatten Beach*, 881 F.2d 816 (police officer's letter to press complaining of manpower shortage held protected); see numerous cases cited *supra*.



disruption must be objectively ascertainable before it may be used as a factor in the balancing equation. E.g., *Jackson v. Bair*, 851 F.2d 714, 717 (4th Cir. 1988). Logic and common sense suggests that any speech - good, bad or indifferent - may always have the potential for some future disruption.

Even when a court objectively determines that there is a serious likelihood of future substantial disruption, the court must also then weigh and balance that against the problems or even disruption that may develop if the employee speech is chilled. To silence a nurse trying to communicate about a staffing policy that is dangerous would risk the health of patients and would have the likely potential to adversely affect employee morale. To frustrate and punish employees for communicating about job related issues will likely jeopardize morale and therefore cause agency inefficiency and disruption. Thus, it seems more logical that the dangers of suppressing speech are far greater than allowing the free flow of ideas.

Speech by public employees, especially that of whistleblowers and others who criticize the government, by its very nature, has the potential to stir things up at the government agency being criticized. Such effects of speech is certainly no reason to balance the interests in the government's favor because First Amendment protection is not limited to non-controversial speech. See *Czurlansis v. Alabnese*, 721 F.2d 98, 107 (3rd Cir. 1983)("it would be absurd to hold that the First Amendment generally authorizes government officers to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office..."); *O'Donnel v. Yanchulis*, 875 F.2d 1059, 1062 (3rd Cir. 1989)(even a finding of actual disruption is not sufficient to conclude that speech is not protected). The First Amendment is designed to prevent governmental employers from requiring public employees "to conform their beliefs and associations to some state-selected orthodoxy." *Rutan*, 111 L.Ed2d at 67.

"Debate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Rankin*, quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Id.*

Circuit Courts have held that potential or threatened disruption is

not enough to limit the First Amendment rights of public employees. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)(police officer's entertainment offensive to some held to be constitutionally protected). Other cases have consistently held that in public agencies, "the complained of disruption must be real [and] not imagined." *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989), quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983). Even where a public employer testifies that the speech "caused a lot of disruption in the department," such speech is constitutionally protected. See *Biggs v. Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990). As *Biggs* demonstrates, conclusory or speculative assertions of disruption are inadequate. Accord *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988)(potential disruption of public employer inadequate basis to punish detective).

### A. Connick is Distinguishable On Several Grounds

*Connick* involved an assistant district attorney, Shelia Myers, who engaged in serious misbehavior causing actual disruption within the District Attorney's office. In *Connick*, Myers was confronted with a job transfer and this action was personal and unique to her, as contrasted with broader personnel issues that may have affected the entire agency.[22] After Myers was informed of the transfer, which she strongly opposed, she responded by preparing an employee survey which was distributed while on the job. Distribution of this survey while on the job caused a "mini-insurrection" within the office. *Id.* at 141.

*Connick* and the case *sub judice* are distinguishable on a number of factual and legal grounds. Myers' alleged protected conduct came on the heels of her own personnel dispute, while Churchill had no pending personnel or personal dispute with anyone. Myers' statements questioned the integrity of her own supervisors in a highly sensitive context in a district attorneys' office, while Churchill's speech focused upon dangerous policy. Myers' conduct was designed to "gather ammunition for another round of controversy with her superiors... [and reflected her] dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.* at 148. Churchill's speech bears no relation to the obvious personal and personnel dispute as in *Connick*. The critical

[22] Here, Churchill's speech not only related to a matter affecting the entire agency, but also the delivery of health services to an entire community.



difference is that *Connick* involved matters of only limited public concern, while public health is an issue of overwhelming public concern. This distinction is dispositive.

### B. Actual vs. Potential Disruption

In *Connick*, the Court, in dicta, observed that the employer may not have to allow full disruption to materialize before taking action **where the matter in question does not involve clear public concern.** Since Myers' conduct in *Connick* only involved public concern in the slightest and most tangential respect, her conduct was clearly outweighed by the employee's on-the-job "mini-insurrection." The question of reasonable apprehension of disruption did not have to be analyzed in *Connick* because what happened was an actual "mini-insurrection." Churchill's conduct cannot be remotely likened to that of Myers.

### C. The Sliding Scale of Protection Depends Upon the Degree of Public Concern

The "reasonable belief" test applies only when the speech "touch[es] upon matters of public concern in only a most limited sense..." *Connick*, 461 U.S. at 154. *Connick* emphasized that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved public concern." 461 U.S. at 152. This "stronger showing" of disruption is applicable here because Churchill's conduct involved the type of substantial public concern that *Connick* envisioned. This fact is born out in circuit cases construing *Connick*, as actual disruption is required in cases where the public concern is particularly strong.

"The nature of the government's burden to show disruption, moreover, varies with the content of the speech." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992)(employee's memo criticizing her own employing agency's director and problems within the agency held to constitute a matter of public concern and protected). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* The disruption to be proven by the employer must be "actual, material and substantial ..." Id at 1140, citing numerous cases. Disruption must be "real [and] not imagined."

The latest public employee free speech cases demonstrate that even reports by public employees about their own personnel related problems

are typically of public concern because of the broad public impact of adverse conditions in public agencies. E.g., *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992)(complaints about sex harassment within police agency are of public concern); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992). "Where First Amendment rights are concerned, operational efficiency must be real and important before they can serve as a basis for discipline or discharge of a public employee." *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985); *Schalk v. Gilmore*, 906 F.2d at 496.

In view of the overwhelming public concern for nurse staffing policies, substantial disruption would have to be shown to outweigh the right to free speech. See *Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989); *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988).

*Connick's* "reasonable belief of disruption" language in dicta must be carefully analyzed in light of traditional First Amendment values. While this slippery standard would only be applicable where there is not a substantial public concern, this standard is very difficult to apply. This standard affords abusive public employers with unwarranted discretion to subvert important speech rights.[23]

## THE NON-ISSUE OF THE DUTY TO INVESTIGATE

Petitioners purport to claim that the Seventh Circuit's analysis regarding the employer's knowledge of the nature of the speech is somehow erroneous. Petitioners also obfuscate the real issues here by complaining that a public employer has no duty to investigate the nature of an employee's conduct before proceeding to terminate the employee even where the conduct in question has been historically protected. Contrary to Petitioners' assertions, this Court is not presented with the question of whether a public employer has some separate and independent duty to investigate the conduct of its employees before termination. Petitioners have a duty to not act with deliberate indifference to the free speech rights of their employes.

---

[23] The actual disruption standard is far more appropriate because evidence of actual disruption is objectively ascertainable. Potential disruption involves speculation. The potential disruption determination presents difficult problems that is unworkable in application.



Petitioner's theory evades the essential question of who has the burden of proof in justifying the discharge. In *Rankin* and *Connick*, this Court squarely held that "[t]he state bears a burden of justifying the discharge on legitimate grounds". *Rankin*, 483 U.S. at ; *Connick*, 461 U.S. at 150. *Accord Elrod v. Burns*, 427 U.S. 347, 362 (1976)("the burden is on the government..."). The governmental employer must establish that the speech was not protected by showing that there was a compelling governmental interest to justify the discharge of Churchill.

The Seventh Circuit decision below is consistent with the teachings of this Court.[24] The Seventh Circuit found that it was unnecessary to recognize a First Amendment right to due process. 977 F.2d at 1126. As the Seventh Circuit explained, this Court has enunciated what has become known as the *Mt. Healthy* framework, which has guided the lower courts on the question of causation. *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). As the Seventh Circuit pointed out, a jury must sort out and determine the "point" of Churchill's speech. Thus, in this line of cases, a decision on whether the speech is protected will not come until long after the termination.

However, as the Seventh Circuit explained, where a public employer discharges an employee for speech without knowing the essential parameters of the speech, it acts at its own peril.[25] This type of arbitrary

---

[24] In fact, several cases demonstrate that procedural safeguards are sometimes necessary in the First Amendment context. E.g., *Speiser v. Randall*, 357 U.S. 513, 521 (1957)("before a [public employer] undertakes to restrain unprotected speech, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights..."); *Chicago Teachers v. Hudson*, 475 U.S. 292, 303 n. 12 (1986); Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518, 1520-24 (1970).

[25] The position suggested by the United States is startling. "An employer does not violate the First Amendment when it fires an employee in the mistaken belief that the employee has engaged in insubordinate speech involving purely personal matters." Brief of the United States as Amicus Curiae at 11. First, it was not reasonable for the employer to believe that the speech involved purely personal matters. Rather, it was logical for the employer to believe that the speech related to the questionable cross training program. Second, the notion of allowing a mistaken belief to satisfy an employer's burden of proof under *Rankin* and *Connick* is incredible. However, the United States at least concedes that "[w]e do not argue that the employer must be shown to have known, as a practical matter, that the speech is afforded First Amendment protection." Brief of United States at 15 n.3.

government action is often illustrative of an ulterior motive.[26] Proceeding to terminate Churchill as they did, Petitioners acted with sufficient deliberate indifference to Churchill's rights so as to invoke section 1983 liability. Without doubt, the **conduct** that Churchill engaged in which involved speech was a substantial or motivating factor in the termination. The notion that the employer did not take the minimum time to reasonably ascertain what actually had transpired can not be turned into a defense as Petitioners have attempted to do. If that were the case, every public employer would just act with "willful blindness" in a deceptive way so as to attempt to escape responsibility.

Here, there was such evidence of a retaliatory scheme against Churchill that one can readily infer that the public employer had reason to know the nature of Churchill's speech, the nurse staffing policy. The deliberate indifference test was established, which satisfies the *Mt. Healthy* standard.

## VI PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. 1983 BECAUSE THE LAW WAS CLEARLY ESTABLISHED IN 1987 THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN SPEECH ABOUT INFERIOR NURSING PRACTICES IN PUBLIC HOSPITALS

Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) qualified immunity generally protects "government officials performing discretionary functions" from personal liability when their conduct does not violate "clearly established statutory or constitutional rights..."

Should a public employer have known, as of 1987, that the termination of a public employee for speaking about nursing staffing problems in a public hospital violate the right to free speech? The free speech rights of public employees in this context have been specifically settled at least since 1968 since *Pickering*. The Circuit cases, *infra.*, further

[26] See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts have defined arbitrary and capricious as "willful an unreasonable action without consideration or in disregard of facts or without determining principle." Black's Law Dictionary 96 (5th ed. 1979); *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). A plethora of employment cases demonstrate that the failure of a public employer to make reasonable inquiry into the employment dispute is evidence of arbitrariness, prejudgment and even bad faith. See McGuinness, The Reemergence of Substantive Due Process As A Constitutional Tort : Theory, Proof & Damages, 24 New Eng. L. Rev. 1129 (1990).



demonstrate the principle that free speech claims by public employees are not generally dismissed via qualified immunity because of the long history of recognized free speech protection.

The American ideal of free speech by public employees is as well recognized as any constitutional right. The Eleventh Circuit recently explained in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), that the demotion of a deputy sheriff for speech would violate the First Amendment was clearly established law in 1988. "A reasonable public official in Sheriff Gallagher's place could not have believed, in light of the holdings and rationales of *Pickering* and *Connick* and *Rankin*, that demoting Stough did not violate the First Amendment." 967 F.2d at 1529.[27] A plethora of similar cases specifically involving free speech rights of public employees have rejected qualified immunity and these cases outline the status of the law at given times. E.g., *Buzek v. Saunders*, 972 F.2d 992 (8th Cir. 1992); *Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990); *Click*, 970 F.2d 106 (5th Cir. 1992); *Brawner v. City of Richardson*, 855 F.2d 187, 193 (5th Cir. 1988)(termination of public employee for speech about departmental problems held clearly established; qualified immunity not available).

Similarly, *Vasbinder v. Ambach*, 926 F.2d 1333 (2nd Cir. 1991) held that the law prohibiting retaliation against public employees has been clearly established since *Pickering*. Accord *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989)(no qualified immunity for discharge of public employee for free speech); *Lewis v. Harrison*, 805 F.2d 310 (8th Cir. 1986)(same). Numerous other circuit courts have held that First Amendment rights of public employees are well established.[28] In any event, summary judgment is not favored on qualified immunity where there is an issue of motive. *Conner v. Reinhard*, 847 F.2d 384, 398-99 (7th Cir. 1988); *Prokey v. Watkins*, 942 F.2d 67, 74 n. 7 (1st Cir. 1991).

The Seventh Circuit below correctly held that summary judgment must therefore be denied to Petitioners because they violated clearly established law and because fact questions remain regarding motive that make summary judgment inappropriate.

[27] "Precise factual correlation between then existing law and the case at-hand is not required." *Snell v. Tunnel*, 920 F.2d 673, 699 (10th Cir. 1990).

[28] *Piesco v. City of New York*, 933 F.2d 1149 (2nd Cir. 1991)(denying qualified immunity in public employee retaliation case); *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989); *Dube v. State*, 900 F.2d 587 (2nd Cir. 1990); *Roth v. Veterans' Adm.*, 856 F.2d 1401 (9th Cir. 1988).

## CONCLUSION

Churchill's speech helped focus professional and public concern on vital issues of public health and safety. To allow Churchill's discharge would chill every public employee into a dangerous code of silence. The government has not proved that it had some paramount, vital and compelling interest as required by this Court's cases in order to limit Churchill's speech. The fact questions predominate making summary judgment inappropriate. The judgment of the Seventh Circuit must be affirmed.

J. Michael McGuinness*
McGuinness & Parlagreco
P.O. Box 8035
11 Church Street, Suite 306
Salem, MA 01970
508-741-8051
Counsel of Record
For *Amici*